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In the Supreme Court of the United States

OCTOBER TERM, 1957

EMIL SARKIS, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

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INDEX

	Page
Opinion below	1
Jurisdiction	1
Questions presented	1
Statutes involved	2
Statement	3
Argument	9
Conclusion	12

CITATIONS

Cases:

Hale v. *United States*, 149 F. 2d 401, certiorari denied, 326 U. S. 732	11
Kemler v. *United States*, 133 F. 2d 235	10
United States v. *Ginsburg*, 96 F. 2d 882, certiorari denied, 305 U. S. 620	11
United States v. *Troop*, 235 F. 2d 123	10

Statutes and Rule:

18 U. S. C. 2	3
18 U. S. C. 201	2
18 U. S. C. 371	3
Rule 30, F. R. Crim. P	11

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OPINION BELOW

The opinion of the Court of Appeals (Pet. 17–34) is reported at 250 F. 2d 514.

JURISDICTION

The judgment of the Court of Appeals was entered on December 27, 1957 (Pet. 35). A petition for rehearing was denied on January 20, 1958. The petition for a writ of certiorari was filed on February 18, 1958. The jurisdiction of this Court is invoked under 28 U. S. C. 1254 (1).

QUESTIONS PRESENTED

1. Whether there was sufficient independent evidence of petitioner's participation in a conspiracy

with his accountant to bribe an Internal Revenue agent investigating petitioner's tax returns to justify admission against petitioner of statements made by the accountant and to support petitioner's conviction.

2. Whether petitioner was entitled to acquittal on the ground of entrapment.

STATUTES INVOLVED

18 U. S. C. 201 provides as follows:

> Whoever promises, offers, or gives any money or thing of value, or makes or tenders any check, order, contract, undertaking, obligation, gratuity, or security for the payment of money or for the delivery or conveyance of anything of value, to any officer or employee or person acting for or on behalf of the United States, or any department or agency thereof, in any official function, under or by authority of any such department or agency or to any officer or person acting for or on behalf of either House of Congress, or of any committee of either House, or both Houses thereof, with intent to influence his decision or action on any question, matter, cause, or proceeding which may at any time be pending, or which may by law be brought before him in his official capacity, or in his place of trust or profit, or with intent to influence him to commit or aid in committing, or to collude in, or allow, any fraud, or make opportunity for the commission of any fraud, on the United States, or to induce him to do or omit to do any act in violation of his lawful duty, shall be fined not more than three times the amount of such money or value of such

thing or imprisoned not more than three years, or both.

This section shall not apply to violations of section 212 of this title.

18 U. S. C. 371 provides:

If two or more persons conspire either to commit any offense against the United States, or to defraud the United States, or any agency thereof in any manner or for any purpose, and one or more of such persons do any act to effect the object of the conspiracy, each shall be fined not more than $10,000 or imprisoned not more than five years, or both.

* * * * *

18 U. S. C. 2 provides:

(a) Whoever commits an offense against the United States or aids, abets, counsels, commands, induces or procures its commission, is punishable as a principal.

(b) Whoever willfully causes an act to be done which if directly performed by him or another would be an offense against the United States, is punishable as a principal.

STATEMENT

Petitioner was convicted under counts 2 and 3 of an indictment returned in the United States District Court for the Eastern District of Missouri (R. 117–118). Count 2 charged petitioner and one Marbs with bribing an Internal Revenue agent investigating petitioner's tax liability, and count 3 charged petitioner, Marbs, and Schulze with conspiracy to offer and give such bribe (R. 2–4). Petitioner was given concurrent sentences of 18 months' imprisonment (R. 113–114).

On appeal (R. 115–116), the judgment was unanimously affirmed (Pet. 35).

Pertinent evidence adduced at the trial may be summarized as follows:

Internal Revenue agent Brown was assigned to investigate petitioner's income tax returns for 1952 and 1953 (R. 13, 17). In response to a call from Brown, on November 2, 1954, petitioner appeared with his accountant, Mr. Moran, and for about an hour discussed his tax liability with Brown (R. 17–18). Petitioner agreed to allow Brown to examine his safe deposit box. This was done two days later on November 4 (R. 18, 35).

On February 1, 1955, defendant Marbs, a former Internal Revenue agent, told Brown that he was to represent petitioner in the examination of petitioner's tax file, and asked what would be necessary to bring it to an early closing. Brown replied that anything pertinent to the tax items for the years involved and signed net worth statements would be helpful, and that he would see what could be done about it (R. 18–19). On March 3, Brown was approached by defendant Schulze, an Internal Revenue employee, who said that Marbs had asked about the possibility of closing the case by accepting the return as filed. Schulze said, "I asked Ollie [Marbs] what is in it for Brown, and he said five hundred." Schulze stated to Brown, "Five hundred dollars would make a nice down payment on a new automobile, ought to think it over " (R. 21, 46, 47). On March 14, Brown reported this incident to his supervisor after which the matter was referred to the Intelligence Division (R. 21).

On May 16, 1955, Brown telephoned petitioner's home for the purpose of reopening the tax examination, and left his telephone number for petitioner to call back. When petitioner returned the call, Brown asked whether Moran or Marbs was representing him, and petitioner stated, "Well, I will let you know" (R. 22, 23, 34). On May 17, Marbs called Brown and stated that petitioner had informed him that he (Marbs) was going to represent petitioner (R. 22, 24, 34, 40). On May 20, Marbs called Brown, who stated that he wanted to know definitely who was to represent petitioner, since a different accountant (Moran) had appeared with petitioner at the first meeting. Shortly after this, Marbs called back to state that he had conferred with petitioner, and that he was to represent both petitioner and petitioner's brother in the tax examination (R. 24, 25, 40). At a meeting on May 24, Marbs told Brown that, although he was representing both petitioner and his brother, he (Marbs) was desirous of closing only petitioner's case at that time. Brown stated that he could probably arrange a "no change" report[1] if Marbs so desired. Marbs told Brown that the money had been placed in the safe of a mutual friend of Marbs and petitioner, and that when Brown mailed the "no change" letter to petitioner, petitioner would call the friend, who would in turn authorize Marbs to pick up the money and turn it over to Brown (R. 26, 40, 41).

[1] Brown testified that a "no change report is mailed to the taxpayer after a closed examination informing him that there has been no change of tax liability as to a deficiency or overassessment" (R. 26).

On May 25, 1955, when called by Marbs, Brown stated that he, together with other government agents, had prepared a "no change" letter. Brown said he requested that it be given to him rather than to petitioner so that he could effect the simultaneous exchange of the letter for the money. Marbs promised that he would discuss this with petitioner. When Brown called back later that evening, Marbs stated that he had arranged a meeting with petitioner at nine o'clock the next morning, and that he would meet Brown an hour later (R. 27–28). At the meeting on the morning of May 26, Marbs told Brown that he had been unable to talk to petitioner, and therefore did not have any money with him. Brown stated, "Well, the only person to date who has made mention of a specific sum of money has been Mr. Schulze. However, I presume it is a fixed amount." Marbs then stated that the amount would be $500 (R. 28).

On June 2, Brown called Marbs to say that if petitioner would call and tell Brown personally to drop the "no change" report in the mail, this would be done. In a return call, Marbs stated that petitioner did not feel that this was in accordance with the agreement and wanted Brown to mail the report without petitioner calling (R. 28–29).

On June 3, Brown called Marbs, stating that if petitioner wanted the report mailed, he (Brown) would drop it in a mail box designated by Marbs, meet Marbs there, and collect the money upon mailing the report. Marbs thought this would be agreeable, and said he would discuss it further with petitioner (R.

29). On June 7, when Brown called Marbs, Marbs announced that petitioner was not happy with Brown's proposal and wanted the report mailed as agreed. Later that afternoon Brown mailed the "no change" report, and called Marbs to say that he should inform petitioner that he would receive it the next day (R. 29, 42, 65).

On June 8 and 9, Marbs told Brown that he had not contacted petitioner. On June 10, Brown called Marbs and told him that unless the matter were closed by the following Monday, June 13, he was going to conduct a real examination of petitioner's tax returns. Marbs stated that, although he had been unable to reach petitioner, he was sure he could contact him over the weekend (R. 29–30, 42, 44, 57–59, 53).

On June 13, since petitioner had returned from out of town, Marbs called to suggest that Brown call petitioner who could in turn call Marbs to give an "okay" for payment of the money to Brown (R. 30). Brown called petitioner's home (R. 59–60, 53) and when petitioner returned this call the following conversation occurred (R. 31, 60, 53–54):

> BROWN: Brown speaking.
> PARTY CALLING: Hello. Mr. Brown?
> BROWN: Yes.
> PARTY CALLING: This is Sarkis.
> BROWN: Emil?
> PARTY CALLING: Yes, sir.
> BROWN: How are you?
> PARTY CALLING: All right. How are you?
> BROWN: I was just wondering, did you ever get that no change letter? I mailed that.

PARTY CALLING: Yes, I got it a couple of days ago, Mr. Brown.

BROWN: I talked to Marbs. He didn't get an O. K. to release that money.

PARTY CALLING: That what?

BROWN: I thought—were you going to call Marbs?

PARTY CALLING: I'll get ahold of Marbs. I'll see what he—I'll talk to him.

BROWN: O. K. Then you'll call Marbs.

PARTY CALLING: Right. Is he home now?

BROWN: I talked to Marbs about fifteen, twenty minutes ago, I think. He was at home.

PARTY CALLING: O. K. I'll call him there.

BROWN: All right.

PARTY CALLING: Fine.

Later that afternoon (June 13), Marbs called Brown to say that he would meet him the following day, and "this time there would be no mixups" (R. 32, 61, 54).

On June 14, Marbs called Brown to arrange a meeting on a street corner in downtown St. Louis. Marbs appeared at the appointed place and handed Brown an envelope containing $400. Marbs explained that the payment was $100 short, since petitioner needed this money for a son graduating from the eighth grade, and that petitioner would pay the other $100 at a later date (R. 32–33, 62–63). When Brown asked Marbs about the tax examination for petitioner's brother, Marbs stated that "the same deal could be worked out there" (R. 33). Marbs was arrested after payment of the bribe (R. 64–67).

The case was submitted to the jury on the theory that petitioner's participation in the conspiracy oc-

cured, if at all, on or after May 16, 1955, *i. e.*, when Brown asked petitioner who was representing him (R. 101, 105).

ARGUMENT

1. Petitioner attacks the sufficiency of the evidence to support his conviction, arguing that there was insufficient evidence of his participation independent of statements made by Marbs to Brown to justify admission of statements by Marbs against him, and that without such statements the evidence is insufficient to support his conviction. The evidence, other than statements by Marbs, however, amply justifies the conclusion of the jury that petitioner, after May 16,[2] participated in a conspiracy to bribe Brown so as to render the acts and statements of Marbs admissible. And, together, the admissible evidence establishes guilt beyond a reasonable doubt.

Petitioner knew his returns were under investigation when on May 16, 1955, Brown asked petitioner whether Marbs represented him. Petitioner said he would let Brown know. Thereafter petitioner never took steps to repudiate Marbs as his representative. Rather, in the telephone conversation of June 13, 1955 (R. 60), the day prior to payment of the bribe, petitioner revealed his knowledge and demonstrated his

[2] Since the case was submitted to the jury on the theory that petitioner's participation dated from May 16, 1955, petitioner's objection (Pet. 13–14) to the remarks by the Court of Appeals as to the two-day delay in examining the safety deposit box in November, 1954, are irrelevant to the issue. Actually, all that the Court of Appeals noted was that the request to examine the box put the petitioner on notice that his returns were being seriously considered.

participation in the plan which Marbs had been effectuating. In that conversation petitioner made no denial to Brown that Marbs was representing him, and expressed no disavowal of the arrangement for payment of the money. Instead, petitioner promptly stated that he would call Marbs. There is a reasonable inference that he did so and directed Marbs to pay, since Marbs delivered the bribe money the next day. All this was independent evidence admissible to show the nature of the conspiracy and petitioner's participation. It was more than sufficient to justify admission against petitioner of evidence as to the statements of Marbs in promising to pay and paying money to Brown.[3] Petitioner was thus properly convicted of conspiracy and of aiding and abetting the substantive offense.

2. Petitioner's contention, that upon the basis of his telephone conversation of June 13, 1955, with agent Brown (R. 60) he was entitled to acquittal on the ground of entrapment, is without substance. At that

[3] It was not incumbent upon the government to show that petitioner was not in fact entitled to the "no change" report, as petitioner suggests (Pet. 12–13). The crime was complete upon a showing of payment of the bribe to agent Brown with intent to influence his decision upon a matter pending before him in his official capacity, and with intent to influence him to do an act in violation of his official duty. It was immaterial whether the "no change" report would be of actual benefit to petitioner. Cf. *United States* v. *Troop*, 235 F. 2d 123, 124–125 (C. A. 7); *Kemler* v. *United States*, 133 F. 2d 235, 238 (C. A. 1). There is, moreover, nothing in the record to indicate, as petitioner intimates (Pet. 13), that the accountant Marbs unscrupulously used part of his fee from petitioner to bribe Brown without petitioner's knowledge so as to avoid extensive work.

time the bribery plan was not just beginning (as petitioner's argument implies), but was already well on its way toward completion. The arrangements had long since been made and petitioner had already received the favorable "no change" report in accordance with Brown's part of the agreement. The only action remaining was for petitioner to authorize Marbs to pay the bribery money to Brown. Petitioner's complaint really is that the telephone call foiled his careful plan to keep his personal participation as covert as possible. That does not constitute entrapment.

The entrapment argument, moreover, is an afterthought. Although counsel for Marbs urged entrapment and the court instructed as to this subject on his behalf, counsel for petitioner did not request a specific entrapment instruction for petitioner (R. 100–101, 106). Where an accused does not defend upon entrapment or offer instructions on this defense, he may not raise it for the first time on appeal. *E. g., United States* v. *Ginsburg,* 96 F. 2d 882, 885–886 (C. A. 7), certiorari denied, 305 U. S. 620; *Hale* v. *United States,* 149 F. 2d 401, 403 (C. A. 5), certiorari denied, 326 U. S. 732. See Rule 30, F. R. Crim. P.

CONCLUSION

For the reasons stated, it is respectfully submitted that the petition for a writ of certiorari should be denied.

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